BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Investigation on the Commission's Own Motion into the Rates, Operations, Practices, Services and Facilities of Southern California Edison Company and San Diego Gas and Electric Company Associated with the San Onofre Nuclear Generating Station Units 2 and 3.	I.12-10-013 (Filed October 25, 2012)
And Related Matters.	A.13-01-016 A.13-03-005 A.13-03-014 A.13-03-013

OPENING BRIEF
OF THE OFFICE OF RATEPAYER ADVOCATES

I. INTRODUCTION

Pursuant to the *Joint Ruling of Assigned Commissioner and Administrative Law Judge Reopening Record, Imposing Ex Parte Contact Ban, Consolidating Advice Letters, and Setting Briefing Schedule*, dated May 9, 2016 ("Joint Ruling"), the Office of Ratepayer Advocates ("ORA") hereby submits its Opening Brief.

The settlement process has been compromised by the *ex parte* violations of the Southern California Edison Company ("SCE"). The question of whether the Settlement Agreement complies with the Commission's standards for approving settlement agreements set forth in Rule 12.1(d) of the Commission's Rules of Practice and Procedure ("Rules") turns on the valuation of the damage to the settlement process caused by SCE's actions. In ORA's view, ratepayers should be made whole.

In order to be made whole, ratepayers should receive the quantifiable loss attributable to SCE's actions. That quantifiable loss was ORA's withdrawal from its litigation position. Based on ORA's calculations, which incorporate the recently-booked Nuclear Energy Insurance Limited ("NEIL") proceeds, the current difference between ORA's litigation position and that of the Settlement Agreement in question is approximately $383 million. In order for the Settlement Agreement to meet the Commission's standards for approving settlement agreements set forth in Rule 12.1(d), $383 million should be refunded by SCE to SCE's ratepayers.

Further, ORA believes that the $25 million in shareholder funds allocated for the Greenhouse Gas Research and Reduction Program should be transferred to ratepayers.

II. FACTUAL BACKGROUND

The settlement in question relates to the San Onofre Nuclear Generating Station ("SONGS") shutdown. More specifically, Units 2 and 3 were forced to shut down prematurely and permanently due to a steam generator tube leak which occurred on January 31, 2012.

The Commission instituted the above-captioned Order Instituting Investigation, and the parties presented testimony, other evidence and argument. SCE, SDG&E, ORA and other parties engaged in settlement discussions, ultimately resulting in a settlement.[1] However, during the settlement discussions, ORA was unaware that SCE had engaged in material, undisclosed *ex parte* meetings with decision-makers.

It has now come to light that SCE had engaged in numerous unreported *ex parte* meetings with Commission decision-makers during the pendency of SCE's settlement negotiations with ORA and other parties. These improper *ex parte* meetings tainted that process. On that score, SCE's failings are described in D.15-12-016, which found *ex parte* rule violations as well as a Rule 1.1 violation, and levied a fine of $16,740,000 on SCE.

[1] *See* D.14-11-040.

Through the tainted bargaining process, what SCE gained from ORA was ORA's withdrawal from its litigation position, resulting in a quantifiable loss to ratepayers.

III. THE DIFFERENCE BETWEEN ORA'S LITIGATION POSITION AND THE SETTLEMENT

A summary of the differences between the litigation positions of SCE, TURN and ORA, compared to the Settlement Agreement, is presented on page 6 of SCE's Response to the Joint Ruling. In Table 1 below, ORA has adjusted those figures to recognize the ratepayers' share of the NEIL settlement proceeds amounting to $293 million.[2] The NEIL settlement relates to insurance associated with replacement power.[3] ORA adjusted the Settlement amount by the entire $293 million since the Settlement Agreement provided for the recovery of replacement power costs of $389 million from ratepayers. ORA and TURN's litigation positions have been adjusted by 75% of the replacement power costs, which is equivalent to the same percentage of NEIL proceeds as a ratio of total replacement power costs recovered in the Settlement Agreement. This results in a $62 million adjustment to the ORA and TURN litigation positions as shown in Table 1.

Making adjustments to the original ORA litigation position and Settlement Agreement amounts, to take into account the NEIL proceeds, results in a difference of $383 million between the Settlement Agreement and the ORA litigation position. ORA recommends that an adjustment of $383 million be adopted by the Commission to be refunded by SCE to ratepayers, in order to make ratepayers whole, for the harm perpetrated by SCE in this case.

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[2] SCE Response to Joint Ruling at 8.

[3] SCE Response to Joint Ruling at 7-8.

Table 1: Comparison Between Litigation Positions and Settlement Agreement
(in millions of dollars)[4]

	TURN Litigation	ORA Litigation	Settlement Agreement
PVRR @ 10.00%	$ 2,061	$ 1,923	$ 2,537
RSG Base Plant	900	708	1,056
O & M	659	627	704
Nuclear Fuel	419	419	389
Replacement Power	83	83	389
NEIL Adjustment	(62)	(62)	(293)
Total (w/NEIL adj.)	$ 1,999	$ 1,861	$ 2,244

IV. LEGAL ARGUMENT

It is a legal axiom that one may not profit by one's own wrongdoing at the expense of another.[5] The profit that SCE gained from ORA was ORA's withdrawal from its litigation position. This is the ratepayers' quantifiable loss. Had SCE not engaged in undisclosed *ex parte* communications, ORA would have been in a more informed position to weigh the costs and benefits of such a withdrawal.

Yet, when presented with a case of a utility withholding material information, in an executed agreement, the Commission has observed, quoting the United States Court of Claims, that "[t]he eggs could not be unscrambled."[6] Likewise, in this matter, much of the Settlement Agreement, though tainted by SCE's actions, has been enacted. This leaves the question of what remedy to provide to ratepayers, within this context. As

[4] At this time, the SCE/Mitsubishi Replacement Steam Generator ("RSG") arbitration is still in progress. According to SCE, the "arbitration hearing concluded on April 29, 2016, and post-hearing briefs will be submitted at a later date." (SCE Response to Joint Ruling at 33.) The Amended Settlement Agreement requires SCE to return 50% of the net proceeds of the arbitration to ratepayers. (Amended Settlement Agreement at Sec. 4.11(c)(iv).) Since SCE has claimed $7.57 billion in damages, and Mitsubishi has asserted that its liability is limited by the RSG contract to $137 million, there is still uncertainty related to the magnitude and timing of SCE's potential recovery from Mitsubishi, and thus any proceeds due to ratepayers. (http://www.world-nuclear-news.org/C-Mitsubishi-faces-multi-billion-dollar-claim-over-SONGS-shutdown-2907154.html.)

[5] See, e.g., Restatement of Restitution § 3 (1937).

[6] *Energy Alternatives vs. Pacific Gas and Electric Company*, D.93-02-011, 1993 Cal. PUC LEXIS 62, at *19 (quoting *Chernick v. United States,* 372 F.2d 492, 496 (1967)).

stated above, the Commission should craft a remedy that makes ratepayers whole from what they lost due to SCE's misconduct.

In the competitive bidding context, the Commission has articulated the following principles, which are parallel to the principles that should underlie the ultimate outcome in this proceeding:

> We begin with the policy that in any utility sponsored or administered procedure in which ratepayer dollars are to be contracted or awarded, all competitors are entitled as of right to equal and non-discriminatory access to all material information. While careful use must be made of any analogy, we observe that the United States Securities and Exchange Commission is long and broadly experienced in policing the integrity of the information upon which critical market decisions are premised. We thus turn to the Commission's seminal decision In the *Matter of Cady, Roberts & Co.*, 40 S.E.C. 907, 911-12 (1961), and adopt as our own the rule that there is ***an affirmative duty to disclose material information***. In this instance we impose this duty upon utilities or their agents or delegates [footnote omitted] and declare that the duty is one of disclosing material facts which are known by virtue of their position but which are not known to persons with whom they would contract.[7]

Similarly, here, all of the settling parties, and indeed the public at large, had the right to know about SCE's *ex parte* contacts.[8] Further, the existence of SCE's *ex parte* meetings, and the contents therein, were indisputably material to any party, including ratepayer advocates, in assessing the propriety of a potential settlement.[9] SCE had unfair insight into the Commission's decision-makers' views on the terms of a potentially acceptable settlement.

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[7] *Energy Alternatives vs. Pacific Gas and Electric Company*, D.93-02-011, 1993 Cal. PUC LEXIS 62, *11 (emphasis added).

[8] See, e.g., Rule 8.4.

[9] The Commission had analogized "bidder" and "investor." *Energy Alternatives vs. Pacific Gas and Electric Company*, D.93-02-011, 1993 Cal. PUC LEXIS 62, *12, fn. 4. It is apt to analogize "bidder" to "ratepayer" in this context.

Indeed, the value of undisclosed, material information, and the impact of nondisclosure on bargaining, has also been explained by the Commission:

> . . . withholding the identity of the 787 weatherized homes from complainant and McMurray, while that information was known by PG&E to be in Redwood's possession, ***tilted the playing field*** in Redwood's favor. … This was not general information based on experience obtained in weatherizing similar homes in similar locales; Redwood's knowledge going into the bid was knowledge gained by weatherizing homes for PG&E, of the very type and in the very pool from which the homes to be weatherized under the contract on which it and its competitors were then bidding were to be drawn. Redwood knew precisely which of the 3,200 homes in the original pool had been weatherized and it alone could eliminate from bidding consideration the 787 which it alone knew need not be considered. ... Knowing that these homes did not have to be considered in bid calculation, and armed with actual cost figures for homes of each type remaining in the pool, Redwood had an advantage.[10]

Likewise, here, the playing field had been tilted in favor of SCE.[11] While ORA is experienced in ratemaking and Commission precedent, SCE, through its improper *ex parte* contacts had undisclosed insight regarding what Commission decision-makers believed regarding the instant proceeding. This is a great asset in assessing litigation risk, which in turn impacts bargaining.

The appropriate remedy for nondisclosure of material facts has also been discussed by the Commission:

> We shall leave to a case by case development the formulation of remedies appropriate to the multiple circumstances in which access to material information has been denied or manipulated. Our jurisdiction in this matter is premised upon

[10] *Energy Alternatives vs. Pacific Gas and Electric Company*, D.93-02-011, 1993 Cal. PUC LEXIS 62, at *14-15 (emphasis added). However, not all undisclosed information is necessarily material. *See Energy Alternatives vs. Pacific Gas and Electric Company*, 58 CPUC 2d 531 (1995).

[11] *Cf Energy Alternatives, Complainant, vs. Pacific Gas and Electric Company*, D.92-03-085, 1992 Cal. PUC LEXIS 244, at *27, COL 5 ("The failure to disclose the ex parte contact was prejudicial to other bidders on PG&E's 1991 Humboldt Division program."). The ex parte contact referenced in D.92-03-085 does not appear to include Commission decision-makers, but it is analogous in the sense that it involves a failure to disclose material information.

> the expenditure of ratepayer dollars by entities subjected to our regulatory authority. ***Any breach of the duty to disclose material information threatens ratepayer interests by corrupting the integrity of the market mechanisms upon which they are ultimately reliant for the distribution of goods or services.***[12]

In a footnote, the Commission discussed "recapturing for the benefit of ratepayers" such "unjust enrichment" regarding "infected" deals:

> A fully developed set of civil remedies would also include techniques for recapturing for the benefit of ratepayers any element of unjust enrichment obtained by a contracting party who knowingly participated in a procurement infected with a failure to make timely disclosure of material information.[13]

More recently, the Commission enacted refunds regarding a tainted ratemaking mechanism. The SCE Performance Based Ratemaking ("PBR") Fraud case, D.08-09-038 ("PBR Case"), thereby provides guidance for remediating the taint caused by SCE's actions in this matter.[14] The PBR Case found that SCE employees and management had, among other things, manipulated and submitted false customer satisfaction data, which was used to determine PBR rewards for the Company.[15] The data falsification had occurred over a period of seven years.[16] The PBR Case describes PBR as follows:

> Under PBR, utility performance is measured against established benchmarks. Superior performance, above the benchmark, would receive financial rewards, and poor performance would result in financial penalties to the shareholders.[17]

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[12] *Energy Alternatives vs. Pacific Gas and Electric Company*, D.93-02-011, 1993 Cal. PUC LEXIS 62, at *17 (emphasis added).

[13] *Energy Alternatives vs. Pacific Gas and Electric Company*, D.93-02-011, 1993 Cal. PUC LEXIS 62, at *18, fn. 6.

[14] ORA notes that D.15-12-016, at 52, stated that D.08-09-038 was factually distinguishable from the instant case. However, D.15-12-016 dealt with establishing fines for SCE's violations, not making ratepayers whole in response to SCE's actions. These are two separate questions and ORA believes that the refund analysis in D.08-09-038 is applicable.

[15] D.08-09-038 at 2.

[16] D.08-09-038 at 2. The Company was also fined $30 million.

[17] D.08-09-038 at 3.

A central issue in the PBR Case was whether SCE employees were "selling the survey" and whether management approved of this activity.[18] Investigation records showed that "selling" a customer satisfaction survey included such activities as: telling customers that one would hope to receive a "5+ level of service" or that "a score less than a 5 would not count, would be a failing score, or might lead to disciplinary action taken against the planner."[19] Customer contact information was also falsified by substituting customer contact information with a "5+ Customer List," SCE employee contact information, or the contact information of SCE family members.[20] The scope and scale of such activities were disputed.

The legal and factual situation in the PBR case is analogous to the SONGS settlement negotiations. "Selling the survey" improperly advantaged SCE by providing unearned rewards from ratepayers to SCE. Similarly, knowing the undisclosed perspectives of decision-makers, regarding a multi-billion dollar deal, while sitting opposite the parties that must bargain "in the dark," also provided an unfair advantage to SCE. In both cases, SCE's conduct violated applicable laws.

Ultimately, in the PBR Case, SCE was ordered to refund all of its PBR rewards, along with a related result sharing revenue requirement, and was ordered to forgo subsequent PBR rewards.[21] SCE refunded $80.714 million and was prohibited from seeking an additional $35 million.[22] Thereby, the Commission determined how much SCE had benefitted from its misrepresentations, and simply refunded that amount to ratepayers. In other words, the Commission refunded to ratepayers the entire quantifiable loss that SCE had improperly taken from ratepayers.

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[18] D.08-09-038 at 15-16.

[19] D.08-09-038 at 15.

[20] D.08-09-038 at 20.

[21] D.08-09-038 at 140, OP 6, 7.

[22] D.08-09-038 at 140, OP 6, 7.

The difference between ORA's litigation position and the settlement is $383 million.[23] As stated above, ORA's withdrawal from this litigation position is what SCE gained from its *ex parte* violations in this proceeding. Ratepayers are made whole by refunding this quantifiable loss.

Mitigating the impact of SCE's *ex parte* violations on ratepayers is ultimately at the core of ORA's proposed remedy. The United States Supreme Court has observed that: "[t]he power to reform contracts (as contrasted with the power to enforce contracts as written) is a traditional power of an equity court, not a court of law, and was used to prevent fraud."[24] On this score, the Commission may do all things necessary and convenient in the exercise of its power and jurisdiction over utilities.[25] The Commission has the authority to make ratepayers whole and refund the quantifiable loss of $383 million.

V. $25 MILLION RATEPAYER REFUND FOR THE GREENHOUSE GAS RESEARCH AND REDUCTION PROGRAM

A review of UCLA's late-filed December 12, 2015 *ex parte* notice establishes that the Greenhouse Gas Research and Reduction Program, which was injected into the settlement, was largely influenced by non-parties. However, SCE and San Diego Gas & Electric Company have already agreed to fund this project from shareholder funds. As the project is collateral to the Settlement Agreement, ORA believes that the agreed-upon shareholder contribution should be disbursed to ratepayers.

VI. CONCLUSION

In order for the Settlement Agreement to meet the Commission's standards for approving settlement agreements set forth in Rule 12.1(d), $383 million should be refunded by SCE to SCE's ratepayers. Further, ORA believes that the $25 million in

[23] A party's litigation position is a factor that the Commission may consider in evaluating a settlement. See, e.g., D.96-07-055.

[24] *Cigna Corp. v. Amara*, 563 U.S. 421, 440 (2011) (internal citations omitted).

[25] Pub. Util. Code § 701.

shareholder funds allocated for the Greenhouse Gas Research and Reduction Program should be transferred to ratepayers.

Respectfully submitted,

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